



September 16, 2012

President John L. Hennessy
Provost John Etchemendy
Office of the President
Building 10
Stanford University
Stanford, California 94305-2061

Dear President Hennessy and Provost Etchemendy:

We are writing to express our grave concern about a series of administrative decisions at Stanford University—stretching over several years—regarding Professor Robert Shafer’s scholarly research and intellectual property. The focus of our interest is HIVDB, his free database and web site (<http://hivdb.stanford.edu>, HIVDB) devoted to diagnosis and treatment for HIV/AIDS. The data base is a resource widely used throughout the world with special importance for clinicians and patients in developing countries.

A number of Stanford’s actions compromise fundamental governing principles of faculty intellectual independence and thus constitute serious violations of academic freedom. Other elements of this case remain unresolved and await additional information and adjudication, among them the question of whether Stanford simply exercised poor judgment or in fact was following a policy of excluding faculty members from decision-making about their own intellectual property. The overlap between Stanford’s claims about the HIVDB and the position the university took in *Stanford v. Roche*, a position rejected by the US Supreme Court, remains troubling and unresolved.

We remain concerned about whether Stanford is prepared to commit sufficient resources to make Professor Shafer whole, fully reestablish worldwide confidence in the unencumbered freedom for both research and commercial

access to and use of the data base, and to address Professor Shafer's legal costs. We recognize that Stanford may have additional information bearing on this matter, and we would welcome receiving any documents you would care to provide. Yet there is no doubt on our part that Stanford's declaration that it owned the data base, its decision to conduct third party negotiations about the legal status and future of this resource without notifying or involving Professor Shafer, and its decision to use a faculty member's research without his knowledge in a commercial legal agreement were unacceptable. The damage was compounded when Stanford's general counsel Patrick Dunkley remarked to *Science* magazine that "the university owns the database and had the complete authority to enter into the agreement without consulting Professor Shafer." That statement needs to be publicly repudiated and its consequences addressed.

Although Professor Shafer, a faculty member in Stanford's Department of Medicine, established his HIV database in 1998, it has remained a work in progress as clinicians and researchers worldwide help update and add to it. It enables users to enter viral genetic information for individuals or groups and obtain drug resistance information helpful in devising treatment regimens. Unlike faculty inventions that reach completion on a certain date, HIVDB continues to evolve. As a result, HIVDB is a distinctive example of living intellectual property. It also represents a key component of a faculty member's life work. Stanford's decisions compromised Shafer's ongoing research and undermined international confidence that people could use HIVDB without financial and legal risk.

In 2007, Advanced Biological Laboratories (ABL), a medical software company based in Luxembourg, notified Stanford of its claim that the database infringed the company's patents. Stanford filed suit to invalidate the patents, but soon settled with the company instead. Stanford's settlement, reached without either informing or consulting Shafer, included an agreement to place a statement on the web site declaring that those using it might need to obtain a patent license from ABL. Regrettably, the agreement Stanford's attorneys reached with ABL obtained release only for the University's direct use, offering no protections for the thousands of users from the developing world, thus placing the burden for

disproving indirect infringement—and for demonstrating the invalidity of the ABL patents—directly onto Professor Shafer. Stanford effectively identified its own faculty member as an indirect infringer of ABL’s disputed patents. Directed by Stanford administrators to add the ABL language to the web site, Shafer complied, but also added his own conviction that ABL’s patents were invalid. ABL filed suit against Shafer in 2008, and he began to take on legal expenses, including those incurred in an effort to have ABL’s patents invalidated. Shafer’s legal expenses would eventually mount to about \$300,000.

In April 2010 the Stanford University Advisory Board completed its review of a grievance filed by Shafer. Its April 20 letter to provost John Etchemendy stated that Stanford’s cross-licensing agreement with ABL “‘Imposed a burden’ on Professor Shafer” and was “not consistent with the general principles set forth in the preamble of Statement on Academic Freedom.” The letter continued, “The board judged that it was a mistake to enter into the binding agreement with ABL without consulting Professor Shafer and expressed deep concerns about some of the subsequent actions taken by the university to comply with the binding agreement.” Those actions, the board also concluded, were inconsistent with academic freedom. We share the board’s deep concern.

At the very least, it seems appropriate that the Stanford University administration not only explicitly endorse its advisory board’s ruling that the administration’s actions violated academic freedom but also provide relief for the burdens it placed on Professor Shafer. Moreover, because Stanford’s actions played a role in triggering this series of events—and because Shafer was acting in defense not only of his own academic freedom, but also in defense of all faculty IP rights, indeed of the right for clinicians in developing countries to have access to life saving medical information—we believe there are valid reasons for Stanford to assist Shafer with his legal expenses.

In March 2012, ABL’s patents were finally invalidated “as being directed to an abstract idea preemptive of a fundamental concept or idea that would foreclose innovation in this area” (*SmartGene v. ABL*; Civil Action No. 08-00642). There is good reason to suppose that such patents on diagnostic procedures,

opposed by the American Medical Association and other groups, would not now be awarded at all. Although ABL's assertions have been removed from the HIVDB web site, the international ramifications of Stanford's actions have not disappeared. Stanford needs to work closely with Professor Shafer to devise language and actions that will repair the damage done.

Finally, it must be said that researchers here and abroad have for years made a special effort to make the results of AIDS research freely available as rapidly as possible. Many institutional academic venues—from medical journals to universities—have followed suit. All recognized a special social responsibility in the face of a disease that was killing millions worldwide. Stanford's administration and its legal staff apparently felt other concerns had priority. That history merits reflection and commentary.

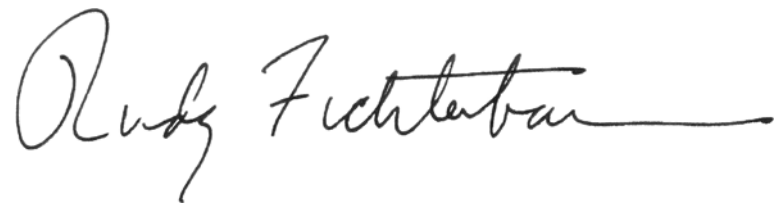
The intellectual property issues raised in this letter are developed at greater length in the AAUP's "Recommended Principles and Practices to Guide Academy-Industry Relations," a major report issued online in draft this June, available at <http://www.aaup.org/AAUP/comm/rep/industry>. An expanded version will be published next year.

We are gratified that Stanford's provost has apologized for the university's actions, but we are convinced that further action is necessary before adequate redress has been achieved.

Sincerely,

A handwritten signature in black ink, appearing to read "Cary Nelson". The signature is fluid and cursive, with a long horizontal stroke extending to the right.

Cary Nelson
AAUP President 2006-12

A handwritten signature in black ink that reads "Rudy Fichtenbaum". The signature is written in a cursive style with a long horizontal flourish extending to the right.

Rudy Fichtenbaum
AAUP President 2012-

Hank Reichman
Chair, AAUP Committee on Academic Freedom and Tenure

cc. Professor Robert Shafer